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IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term 1997

BETH ANN FARAGHER,

*Petitioner,*

v.

THE CITY OF BOCA RATON,
a political subdivision of the State of Florida,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

# MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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**MOTION FOR LEAVE TO FILE A BRIEF**
**AS *AMICI CURIAE***

The Lawyers' Committee for Civil Rights Under Law and the American Civil Liberties Union move for leave to file a brief as *amici curiae*. The issues to be decided herein affect the interests of both organizations, as set forth in the accompanying brief.

We have filed letters of consent from both the petitioner and the respondent, but we have not been able to obtain letters of consent from William Terry and David Silverman, who were defendants before the district court but did not appeal and did not participate in the appellate proceedings below. Counsel for Mr. Terry has informed us that Mr. Terry will not participate before this Court, and former counsel for Mr. Silverman states that he no longer represents Mr. Silverman. We have provided both of these attorneys, as well as attorneys for the active parties, with copies of the accompanying brief in advance of the 3:00 P.M. deadline today.

Richard T. Seymour

RICHARD T. SEYMOUR

Dated: December 29, 1997

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## STATEMENT OF INTEREST[1]

The Lawyers' Committee for Civil Rights Under Law and the American Civil Liberties Union Foundation submit this brief as *amici curiae* in support of the petitioner.[2]

The Lawyers' Committee for Civil Rights Under Law was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, numerous law school deans, and many of the nation's leading lawyers. It has local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. Through the Lawyers' Committee and its affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country, including a large number of cases challenging discrimination in employment based on race or sex. The Lawyers' Committee is a tax-exempt, nonprofit civil rights organization. The Lawyers' Committee has handled

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[1] No counsel for any party had any role in authoring this brief, and no person or entity other than the named *amici curiae* or their counsel have made any monetary contribution to the preparation or submission of this brief.

[2] Pursuant to Rule 37.3(a), *amici* are filing herewith written consents of the remaining active parties to the submission of this brief. Mr. Terry and Mr. Silverman are not participating before this Court. Mr. Terry's counsel has nonetheless promised a letter of consent, but it has not been received. Mr. Silverman's former counsel no longer represents him. In an abundance of caution, *amici* are also filing a motion for leave to submit this brief.

cases involving both racial and sexual harassment.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights and this nation's civil rights laws. The ACLU actively supported the enactment of the 1964 Civil Rights Act and, since its passage, has appeared before this Court in numerous cases involving the meaning and scope of Title VII. Because the ACLU believes that an appropriate test for employer liability is critical to the effective enforcement of Title VII—for women as well as for racial minorities—the ACLU has a substantial interest in the proper resolution of this case.

The decision in this case will decide the standards that will govern claims of racial, sexual, religious, and national origin harassment. Such harassment strongly discourages women and minorities from taking nontraditional jobs, and thus strikes at two of the core purposes of Title VII. Affirmance of the Eleventh Circuit would as a practical matter make Title VII's promise of a harassment-free workplace extremely difficult to enforce, defeating the purpose of Congress in enacting the statute in 1964, and in expanding its remedies in 1991.

## STATEMENT OF THE CASE

The district court made the following findings after a bench trial of all claims: Petitioner worked as an ocean lifeguard in the Marine Safety Section of the Parks and Recreation Department for the respondent City, on an intermittent basis from September 1985 through June 1990. Findings 1–2, Pet. App. at 70a. Her supervisors during that time included Bill



Terry, then the Chief of the Marine Safety Section, David Silverman, a Lieutenant and later a Captain in that Section, and Robert Gordon, then a Captain in that Section. Finding 5, Pet. App. at 71a.

Lifeguards reported to lieutenants "and above them to Marine Safety captains," the captains reported to Marine Safety Chief Terry, he reported to the Recreation Superintendent, the Recreation Superintendent reported to the Director of Parks and Recreation, and the Director reported to the City Manager. However, according to the trial court, "neither Terry, nor Silverman, nor Gordon had the standing necessary to qualify as higher management for the City." Findings 5 and 7, Pet. App. 71a. Neither of the lower courts made any finding identifying the person or position who would have "the standing necessary to qualify as higher management for the City," and neither adopted any rule to guide harassment victims with claims against the City or against other employers within the Eleventh Circuit.

All of the lifeguards were male until 1977, when the City hired its first female lifeguard. At the time of the incidents in question, most of the lifeguards were male, with only four to six female lifeguards out of a total force of forty to fifty. The headquarters building was small, with just one locker room, restroom, and inside shower. All of the lifeguards were required to share the same locker room and shower, leading sometimes to a "somewhat boisterous" camaraderie although the district court credited the testimony of petitioner's co-plaintiff, Ewanchew (after her marriage, Oakland), that "the atmosphere in the locker room was respectful among members of a particular shift." Findings 9–11, Pet. App. 72a.

The trial court found that all of the following touching of female employees by Section Chief Terry was uninvited: "Terry had a propensity to touch female employees on various parts of their anatomies, including the waist, neck, and buttocks." ". . . Terry pressed himself against Ewanchew's buttocks and moved his hips simulating sexual movement." ". . . Terry touched Ewanchew on one breast and on the buttocks." ". . . Terry would put his arm around Faragher and let his hand rest upon her buttock." The court found petitioner Faragher's testimony to be credible "regarding Terry's uninvited touching of her buttocks." The court found "most credible" Beverly Barta's testimony that "Terry touched her on the buttocks without her consent," and that she found it offensive and avoided him afterwards. The court found Jamie Herrington's testimony credible "that Terry placed his hand on her thigh," and found Gayle Nye's testimony credible "that she was the subject of several instances of offensive touching by Terry, such as putting his arm around her hip." Findings 15–19, 21–22, and 24, Pet. App. 73a–75a. The lower court found that Lieutenant Silverman tackled petitioner, and also found that he told her: "'If you had tits I would do you in a minute.'" Finding 27, Pet. App. 76a. The lower court found petitioner's description of the incident credible, and stated that it "disbelieves" Lieutenant Silverman's denial. *Id.* The lower court also found that Lieutenant Silverman engaged in "a pantomime depicting cunnilingus by flicking his tongue, in the presence of both Faragher and Ewanchew, despite Silverman's denial of his having engaged in such conduct." Finding 28, Pet. App. 76a. The court of appeals did not disturb any of these findings.

The lower court did not find that any of this physical conduct could reasonably have been seen by Section Chief Terry or Lieutenant Silverman as innocent, or as anything other than offensive.



The lower court found that Section Chief Terry remarked to Ewanchew that petitioner "was male-like because she had no breasts," and that Terry "referred to women as 'cunts' and 'bitches.'" Findings 20 and 22, Pet. App. 74a–75a. The lower court also found that Section Chief Terry, in the course of conducting the first employment interview with Victoria Bonner for a lifeguard position, "asked her if she was going to 'fuck' or 'screw' all of the male lifeguards like the rest of the female lifeguards," and that as a result Bonner avoided him thereafter. Finding 23, Pet. App. 75a. The lower court found that Lieutenant Silverman made "inappropriate, but not sexually oriented"[3] remarks to Ewanchew "such as, 'There are a lot of tits on the beach today.'" Finding 29, Pet. App. 76a. The lower court also found credible "Gayle Nye's deposition testimony regarding Silverman's use of offensive language when addressing her. On her first day on the job, Silverman said to her, 'I want to lick your clit.'" Finding 36, Pet. App. 79a. The court credited "Jamie Herrington's testimony that Silverman referred to her nipples being apparent under the cloth of her bathing suit because it was cold, and Silverman's remark that he would like to 'eat between her legs.'" Finding 34, Pet. App. 77a–78a. The trial court "found Beverly Barta to be a most credible witness" as to the offensive conduct she experienced from both Terry and Silverman. Findings 21 and 37, Pet. App. 74a, 79a. Barta testified that she heard Lieutenant Silverman ask lifeguard Betty Lynn for a blow job. June 23, 1994 Tr. 6 lines 5–8. The court of appeals did not disturb any of these findings.

The lower court did not find that any of this verbal

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[3] Such remarks have an obvious sexual orientation, but the district court may simply have meant that they were not made as part of a sexual proposition by Lieutenant Silverman.

conduct could reasonably have been seen by Section Chief Terry or Lieutenant Silverman as innocent, or as anything other than offensive.

The court distinguished Ewanchew's testimony about the conduct of Section Chief Terry and Lieutenant Silverman from some of her other testimony, "finding credible her allegations of the conduct by both Terry and Silverman." Finding 31, Pet. App. 77a. The trial court's summary descriptions of Ewanchew's allegations, and its undisturbed finding that all of her testimony about Lieutenant Silverman's conduct was credible, justify this Court's reliance on Ewanchew's full descriptions of Lieutenant Silverman's conduct,[4] and how it came to pass.

By virtue of his rank and in the absence of an emergency, Lieutenant Silverman was entitled to sit with any

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[4] Ewanchew testified, for example, that Lieutenant Silverman repeatedly referred to the percentage chances of rain as the percentage chance that he would "get a blow job today." June 21, 1994, Tr. 55, lines 14–17. Petitioner testified to the same effect, June 22, 1994, Tr. 140 line 24 to Tr. 141 line 2, and stated that on rainy days Lieutenant Silverman "many times" proposed lewdly that she join him in the back of his camper truck, while raising his eyebrows and acting excited. *Id.*, Tr. 141 line 3 to Tr. 142 line 8. Ewanchew testified that Lieutenant Silverman repeatedly banged on the door when women were in the inside shower and stated that he wanted to join the woman in the shower, in effect requiring the women to go en masse into the restroom to provide some certainty that he would not come in while one of them was in the shower. June 21, 1994, Tr. 56 line 20 to Tr. 57 line 5. Peititioner described the same conduct as occurring "many times." June 22, 1994, Tr. 138 line 10 to Tr. 139 line 19. Petitioner also described Lieutenant Silverman's custom of referring to the number of female lifeguards assigned to his section of the beach by doubling the number and stating that he had that many tits on his beach that day. *Id.*, Tr. 145 line line 25 to Tr. 146 line 12.



lifeguard he was supervising, in his or her tower, for as long as Lieutenant Silverman chose.[5] Ewanchew testified as to his conversation when she was an unwilling captive audience:

> And he mentioned, when I sat—well, when he was my lieutenant and I had to sit with him all day, he talked about his sexual conquests with a beach patron that was drunk, and how he had sex with her in the back of his truck. And another lifeguard watched through the window. And I had to sit there and listen to all day his descriptions of what he did with this drunk.
>
> And he often tried to get me in conversations, sexual type conversations. And one time he brought up that term helmet and I didn't know what it was, I didn't know what he was talking about. And I said, What's that? And then he went into a big description about, oh, it's the head of my, of my penis, I and do you want to see him, and do you want to see my helmet.
>
> And he bugged me about that for a long time

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[5] Testimony of Jamie Sue Harrington, June 21, 1994, Tr. 137, lines 18–19 ("sometimes lifeguards and lieutenants would sit in the same lifeguard towers together.") and Tr. 138 lines 1–2 ("Well, during my eight-hour shift I would sit with him for about six hours . . ."); testimony of petitioner, June 22, 1994, Tr. 144 line 11 to Tr. 145 line 9 (she was sometimes assigned to work at one of the busier towers with a Lieutenant, and sometimes the Lieutenant joined her when he came on rounds); testimony of Nancy Ewanchew, June 21, 1994, Tr. 57 lines 17–23 (sometimes she was scheduled to be the second guard at a tower: "And I'd have to sit there all day with him." Other times, he would be making rounds "and sometimes he would sit with you for a certain amount of time and say, you know, what he would call visit with the peach on his beach.").

after and he referred to the women that I worked with that I really liked and I had a good rapport with in real derogatory terms, using words, you know—he said about Betty Leen, he made fun of her breasts and how, made fun of her and said that she hung out of her bathing suits and that she looked funny when she ran, that she bounced all over. And made fun of her.

And he made fun of Beth Faragher and said that she had a flat chest, and made fun of her about that. And said she had a tight ass. And I had to sit there and listen to him when he would come to my tower. And a girl would be sitting on the beach and he would describe beach patrons and say about their body. And he said a lot of things that were very inappropriate on almost a daily basis when I worked with him.

June 21, 1994, Tr. 55 line 18 to Tr. 56 line 19.

Beverly Barta, whom the district court described as "a most credible witness," Finding 37, Pet. App. 79a, testified that Lieutenant Silverman used his rank to further the sexually-oriented atmosphere: "I would say as a leader, I would say he kind of set the tone or the mood for the climate there." June 23, 1994, Tr. 10, lines 10–11.

The trial court found that "Terry's and Silverman's sexual harassment conduct toward females in the Marine Safety Section was both severe and pervasive." Finding 44, Pet. App. 81a. The court also found that "the majority of the female lifeguards" complained to Lieutenant (later Training Captain) Robert "Flash" Gordon. Finding 48, Pet. App. 82a. Gordon testified that "practically all" of the female lifeguards com-



plained to him about sexual language and actions. June 21, 1994, Tr. 153, lines 3–7. He admitted that Gail Nye had complained to him that Lieutenant Silverman "had invited her at lunch time to go back to his truck so that he could lick her clit." *Id.*, Tr. 153 line 19, Tr. 154 line 25 to Tr. 155 line 1. Lieutenant Gordon admitted that petitioner had complained to him "that she had been tackled during the morning workout by Mr. Silverman," *id.*, Tr. 158, lines 16–18, and that "one morning she came up crying and she said that Captain Silverman had thrown her down in the sand and told her that if she had tits he would do her in a minute." *Id.*, Tr. 159, lines 13–15. Lieutenant Gordon admitted that Nancy Ewanchew had complained "several times" about being touched, *id.*, lines 19–24, she complained about language, *id.*, Tr. 160, line 3, and he thought that "she was both verbally and physically harassed."[6] *Id.*, lines 5–7. Lieutenant Gordon admitted that

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[6] The district court's dismissal of Nancy Ewanchew's Title VII claim was based on its finding that Ewanchew did not find Section Chief Terry's or Lieutenant Silverman's conduct intolerable at the time she was employed, but only later. Finding 31, Pet. App. 76a–77a. This finding is supported in the record only by the testimony of Captain Silverman, as to which the trial court stated: "The Court found none of this testimony to be credible," Finding 33, Pet. App. 77a, and by its finding that Ewanchew applied for part-time employment after her resignation, Pet. App. 101a. The district court made no effort to reconcile its finding that Ewanchew did not find the conduct intolerable at the time she was employed with its finding that Ewanchew complained of this conduct to Lieutenant or Captain Gordon, Finding 48, Pet. App. 82a, with Gordon's undisputed testimony that Ewanchew complained about Terry's and Silverman's conduct "probably more than any of the other women on the patrol," June 21, 1994, Tr. 159 lines 19–20, and with its finding that Gordon limited his testimony so as not to "take sides." Finding 49, Pet. App. 82a. The panel opinion in the Eleventh Circuit affirmed, holding that there was no inconsistency between the award of damages on Ewanchew's battery claim,

Ms. Leen complained to him about jokes or wisecracks about the size of her breasts and about Lieutenant or Captain Silverman calling them tits. *Id.*, Tr. 161, lines 2–11.

Lieutenant Gordon testified that the City never told him what he should do if a female employee complained that a man was talking dirty to her or groping her. *Id.*, Tr. 157 lines 3–14. The City did instruct him how to prepare disciplinary action record cards, *id.*, lines 15–20, but he never prepared any such cards in response to the women's complaints because "I didn't think it was my place to record card or discipline a supervisor." *Id.*, Tr. 157 line 24 to Tr. 158 line 12. Moreover, Lieutenant Gordon actively discouraged the women from complaining further:

> Q. What, if anything, did you tell women lifeguards who complained to you, as we've just listed them, about whether or not they should go higher than Mr. Terry and take these complaints to City Hall?

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which could flow from a delayed reaction, and the finding that she did not then perceive her work environment to be hostile. Pet. App. 49a–51a. The panel also upheld the district court's reliance on Ewanchew's post-employment application for a part-time job as showing that she could not have then perceived her work environment to be hostile. Pet. App. 50a. The *en banc* court affirmed the district court on this question without discussion. Pet. App. 5a n.3. Like the district court, the Eleventh Circuit failed to see the irreconcilable conflict in the district court's findings and in the undisputed record, and assumed that a woman must give up her right to work in order to protect a hostile-environment claim. While the clear error in the lower courts' treatment of Ewanchew's then perceptions cannot now be cured, that error should not deter this Court from relying on Ewanchew's testimony as to the notice provided to the City.



> A. Well, I pretty much left that decision to them. But advised them that in the past there have been times when going to City Hall wasn't as productive as we had hoped it would be.

*Id.*, Tr. 161 lines 12–18. He told them they "need to be careful." *Id.*, Tr. 161 line 19 to Tr. 162 line 22. Nancy Ewanchew testified that the reason she complained to Lieutenant or Captain Gordon was because "he was a superior of mine," and she "wanted him to see if he could do something about it or try to stop it or tell them to stop it. And I asked him what I should do." *Id.*, Tr. 65, lines 17–24. She testified that he told her "that the City didn't care and that just to basically just to stick it out." *Id.*, Tr. 66, lines 6–7. She complained again to him about the same types of problems, and stated: "And I couldn't understand why he couldn't do something, being a supervisor." *Id.*, lines 11–13. She complained a third time, and described the response, *id.*, lines 18–21:

> A. It's the same. The same thing. I wanted him to do something about it and he said that I can't do anything, I'm powerless, that the City doesn't care and that there is nothing that can be done, and just to stick it out.

Petitioner was a part-time employee without civil service protection. She understood that Terry was responsible for her evaluations and her raises, and could fire her at will.[7] June 22,

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[7] Richard Bender, the City's Personnel Director, wrote in his report of his investigation into the allegations of sexual harassment that the department is able to relieve itself of unsatisfactory unclassified employees with great facility, and testified that an "unclassified employee serves at the will of the City Manager" and has no civil service job protections. June 24,

1994, Tr. 127 lines 4–20. She testified that she did not complain to someone at City Hall "because I feared retaliation if I did it. I felt like if I did complain, there was probably a good possibility that I would lose my job." *Id.*, Tr. 152 lines 10–14 and 22–25. She testified along the same lines as Captain Gordon, *id.*, Tr. 153, lines 1–7:

> I had heard things. Basically, heard about people being retaliated against that had gone down to complain to City Hall, or—and I also had heard that, you know, even if people did go down to City Hall, basically nothing would happen because of it. It seemed like Bill Terry had absolute, like, control over the beach patrol and what happened there.

The district court held that Captain Gordon's knowledge could not be imputed to the City because he was not part of "higher management," Finding 54, Pet. App. 84a, and because the female lifeguards assertedly talked to him "not on a subordinate to superior basis, but because of the high repute in which he was held . . . ." Finding 48, Pet. App. 82a. The *en banc* court of appeals agreed with that assessment (although reversing the district court on another ground): "Gordon did not receive that information as the City's agent; he received it as a friend held in high repute by his colleagues." Pet. App. 15a n.9.

Personnel Director Bender testified without dispute in the deposition excerpts admitted at trial that supervisors have an affirmative duty to report to management improper activity that could be construed as sexual harassment. June 23, 1994, Tr. 55 lines 11–19 and Tr. 57 line 22 to Tr. 58 line 2. He

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1994, Tr. 24 line 23 to Tr. 25 line 9.



agreed that it is a Captain's job to report incidents of inappropriate behavior to higher-ups. June 24, 1994, Tr. 34 lines 3–5. Bender's undisputed trial testimony was that there was no mention of sexual harassment in the employee handbook, which he had revised several times, and that the City relied instead on a "generalized statement to invite employees to bring forward any problems they had in the workplace to" an undefined "us." *Id.*, Tr. 32, lines 1–14. Bender's undisputed testimony in his deposition excerpts was that employees with problems are urged "to work through the chain of command," that the City did nothing specifically to inform employees how to raise the issue of sexual harassment, and that employees have "the opportunity to talk to supervisors through an informal process." June 23, 1994, Tr. 52 lines 6–8 and Tr. 53 lines 11–14. He did not describe any alternative for employees whose problem was caused by their supervisors.

The district court found that the City had prepared a written sexual harassment policy on February 29, 1986, but also found "a complete failure on the part of the City to disseminate said policy among Marine Safety Section employees. Neither Terry nor Silverman were ever told or made aware of the City's sexual harassment policy prior to" the City's investigation of Ewanchew's letter describing the harassment. The trial court also found that Ewanchew herself never got a copy of the policy while she was employed by the City. Findings 51–52, Pet. App. 83a. Petitioner testified without dispute that she does not recall hearing or seeing anything about the City's sexual harassment policy until May or June 1990, after Ewanchew's complaint to Bender. June 22, 1994, Tr. 153 lines 10–25.

The trial court found that Ewanchew wrote a letter to Richard Bender on April 23, 1990, complaining of sexual

harassment. Finding 41, Pet. App. 80a. This was a year after she had left her job. Findings 2 and 50, Pet. App. 70a and 83a. This was the first such complaint to Parks and Recreation Department management officials higher than the Marine Safety Section. Finding 45, Pet. App. 44. As a result of Bender's investigation, Section Chief Terry forfeited 160 hours of annual leave, and Captain Silverman forfeited 40 hours of annual leave. Finding 42, Pet. App. 80a. The trial court found that "Bender exhibited a somewhat cavalier attitude toward the severity of Terry and Silverman's conduct, and its potential effect upon the City." Finding 44, Pet. App. 81a.

At trial, the district court (a) found the City liable to petitioner for a hostile working environment under Title VII based on constructive notice flowing from the pervasiveness of Section Chief Terry's and Lieutenant or Captain Silverman's conduct, and awarded petitioner one dollar in nominal damages on that claim; (b) found that Silverman and Terry were jointly and severally liable to petitioner on her 42 U.S.C. § 1983 claim and that Terry was liable to petitioner on her battery claim, and awarded petitioner $10,000 in compensatory damages jointly and severally against Terry and Silverman and $500 in punitive damages against Terry; (c) found that the City was not liable to Ewanchew on her Title VII and § 1983 hostile-environment claims; and (d) found that Terry was liable to Ewanchew on her battery claim and awarded her $35,000 in compensatory damages and $2,000 in punitive damages against Terry. Pet. App. 103a–104a. The panel of the Eleventh Circuit reversed the trial court's findings that the City had constructive notice of the harassment and that the City had violated petitioner's rights under Title VII, but affirmed on all other issues. Pet. App. 66a–68a. The divided *en banc* court agreed. Pet. App. 18a.



The question before this Court is therefore not whether there was a hostile working environment, but whether the City can be held liable under Title VII for the unlawful behavior of its officials.

## SUMMARY OF ARGUMENT

While agency principles can provide useful guidance in deciding racial and sexual harassment cases, their application should be guided and limited by the purposes of Title VII.

Here, both agency principles and Title VII independently require that Lieutenant (later Captain) Gordon's knowledge be imputed to the City. He was under a duty to report all matters of significance to higher levels of management, and only the City was in a position to train him in that duty and to enforce it. The petitioner, who was powerless to enforce that duty, should not be visited with the consequences of the City's and Gordon's failures.

The lower court's rule effectively requires harassment victims to use internal complaint procedures where available or, like here, to make one up and follow it. Congress has expressly rejected such a requirement, and the lower court was not free to ignore its action.

Terry and Silverman were each under a duty imposed by the employer to report their own knowledge, and under agency law they are not excused from such a duty by their personal need to cover up their misdeeds. Moreover, their knowledge should be imputed to the City precisely because it involved words or deeds that a reasonable supervisor would know constitutes harassment.

The City is also liable for Terry's and Silverman's actions because they were aided by the agency relationship in accomplishing their harassment.

Finally, the fact that the Marine Safety Section was a few miles "remote" from City Hall cannot be considered a barrier to constructive notice.

## ARGUMENT

### I. The Courts' Reliance on Agency Principles Should Not Be Allowed to Defeat the Purposes of Title VII

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986), the Court held that employers are not automatically liable for sexual harassment by their supervisors, that "absence of notice to an employer does not necessarily insulate that employer from liability," and that "Congress wanted courts to look to agency principles for guidance in this area." At the same time, the Court cautioned that "such common-law principles may not be transferable in all their particulars to Title VII."

Sec. 701(b) of Title VII, 42 U.S.C. § 2000e-(b), defines the term "employer" as including any "agent" of an employer, and *Meritor* stated that this definition "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are responsible." 477 U.S. at 72. At the time, it was still an open question whether Title VII permitted direct suits against harassing supervisors. However, all Circuits addressing this issue in the past decade have held that Title VII does not allow claims against supervisors in their



personal capacities.[8] Because § 1983 is not available against supervisors in the private sector, Title VII claims against employers are often the only means of redress under Federal law for victims of racial or sexual harassment.

The hopes of Congress and this Court that agency law would provide a relatively clear set of principles that would enable the lower courts to develop just and uniform rules of decision have not borne their intended fruit. Different Circuits have developed sharply different views of agency law, and some have misplaced the role of agency law as a guide to the application of Title VII by effectively submerging the purposes of the statute beneath the arcana of agency law as understood in that Circuit. This case presents an opportunity for this Court to restore the primacy of the statute and its purposes, making clear both the manner in which agency law should properly be used in applying the statute and the point at which the courts should

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[8] *E.g.*, *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995); *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1241 n.2 (2d Cir. 1995); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313–17 (2d Cir. 1995); *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1077–78 (3d Cir. 1996) (*en banc*), *cert. denied*, 117 S. Ct. 2532 (1997); *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451 n.2 (5th Cir. 1994); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir.), *cert. denied*, 513 U.S. 1015 (1994); *Geier v. Medtronic, Inc.*, 99 F.3d 238, 244 (7th Cir. 1996); *Williams v. Banning*, 72 F.3d 552, 553–54 (7th Cir. 1995) (recognizing that plaintiff had no remedy for sexual harassment, because the employer took prompt and effective corrective action when plaintiff stopped insisting that her complaint be treated as confidential); *Ortez v. Washington County*, 88 F.3d 804, 808 (9th Cir. 1996); *Greenlaw v. Garrett*, 59 F.3d 994, 1001 (9th Cir. 1995), *cert. denied*, 117 S. Ct. 110 (1996); *Haynes v. Williams*, 88 F.3d 898, 901 (10th Cir. 1996) (availability of damage claims under the 1991 Act does not change the rule); *Cross v. Alabama Department of Mental Health & Mental Retardation*, 49 F.3d 1490, 1504 (11th Cir. 1994).

look to the purposes of Title VII rather than agency law for their principal guidance.

## II. The Lower Court Misapplied Agency Law, and Ignored the Purposes of Title VII, in Failing to Impute Gordon's Knowledge to the City

Based on their experience in representing clients in numerous cases, *amici* have found that the fear of retaliation is both so frequent and so intense that a discriminatory situation may fester long before a victim summons enough courage to complain. The fear of retaliation is particularly strong in cases involving intentional racial or sexual discrimination, because the intensity of the wrongdoer's reaction is in our experience related to the degree to which the conduct is shameful.

The courts and Congress have long recognized the substantial danger of workplace retaliation for reporting a noncriminal violation of law. In Fair Labor Standards Act cases prosecuted by the government, the courts have recognized an "informant's privilege" to protect employees from retaliation, itself unlawful but difficult to prove, where such protection does not interfere with the employer's ability to mount an effective defense, or the government's needs in prosecuting the case.[9]

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[9] *E.g.*, *Brock v. On Shore Quality Control Specialists, Inc.*, 811 F.2d 282 (5th Cir. 1987); *Wirtz v. B.A.C. Steel Products, Inc.*, 312 F.2d 14, 16 (4th Cir. 1962) ("The average employee involved in this type of action is keenly aware of his dependence upon his employer's good will, not only to hold his job but also for the necessary job references essential to employment elsewhere."); *Mitchell v. Roma*, 265 F.2d 633, 637 (3d Cir. 1959) ("The statutory prohibition against retaliation provides little comfort to an employee faced with the possibility of subtle pressures by an employer, which pressures may be so difficult to prove when seeking to enforce the prohibition.").



Congress has enacted a specific prohibition of retaliation in § 704 of Title VII, and this Court held just last Term that even former employees are protected by this prohibition. *Robinson v. Shell Oil Co.*, __ U.S. __, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997).

The well-placed fear of retaliation must be taken into account before imposing jump-through-the-hoops complaint requirements on harassment victims. Our practical experience reveals that victims of racial and sexual harassment are often persons with relatively little "clout" in an organization. The selection of the official to whom to complain is often an agonizing decision, and the most natural recipient of such a complaint will be an official the complainant knows, *i.e.*, one close to her or his own level. Particularly where the employer has not advised employees of anyone different to whom they should complain, it is simply unrealistic to expect victims to complain to persons they do not know and have never met. Adoption of the Eleventh Circuit's standard would, in practical terms, come close to a grant of immunity.

The Eleventh Circuit's application of its "high enough in the hierarchy" precondition for imputing notice demonstrates the rule's destructive effects on Title VII rights. In *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752, 754 (11th Cir. 1996), for instance, two employees of a Pizza Hut restaurant complained of sexual harassment by a co-worker to the restaurant manager. Although the court found that the restaurant manager had "managerial responsibilities at the Pizza Hut facility," the court held that the complaints did not constitute notice to the employer because the manager was not high

enough in the corporate hierarchy. Even though the employer presumably vested in the manager the authority and duty to end the harassment, the manager's knowledge was not imputed to the employer. If an assistant cook at the Pizza Hut were to report to the manager that the head cook was cooking with tainted meat, can anyone doubt that the restaurant owner would be liable if the manager neither stopped the practice nor reported it to higher corporate officials?

The lower court's companion rule that notice to a supervisor does not count if the official receiving notice was selected because of high repute among the employees or because he or she was considered friendly is even more destructive of Title VII rights. To whom can a fearful employee be expected to complain, if not an official of the defendant who is known to be both trustworthy and sympathetic?

The most troubling aspect of the Eleventh Circuit's dual conditions for effective notice is that they are counter-intuitive. They could not be predicted by a reasonable victim, and victims would have to speak to a lawyer or conduct legal research on their own to find out the person to whom they should complain. Even then, they would run the risk of guessing incorrectly. For example, the opinion below does not state whether a complaint to the Director of Recreation would have sufficed. A victim who tries complaining at this level may have the rug pulled out from under her feet years later.

These restrictions are inconsistent with the statute. This Court has previously emphasized that even the administrative process under Title VII has to be simple enough for a lay person



to trigger,[10] and it would seem to follow that any notice requirements would have to be comparably easy to satisfy.

The undisputed testimony of the Director of Personnel was that Gordon, both as a Lieutenant and as a Captain, had an affirmative obligation to report to higher officials both his observations of sexual harassment and the complaints made to him. As the Seventh Circuit has held, where an employee complains of harassment to a supervisory employee "who could reasonably be expected to refer the complaint up the ladder to the employee authorized to act on it," the employer should be deemed on notice of the harassment. *Young v. Bayer Corp.*, 123 F.3d 672, 675 (7th Cir. 1997); *see also Torres v. Pisano*, 116 F.3d 625, 636-637 (2d Cir.), *cert. denied*, 66 USLW 3385 (U.S., Dec. 1, 1997) (No. 97-578).

This rule, rather than one that relies on a formalistic distinction between "low-level" and "higher" management, focuses on the practical, more grounded distinction between those who could reasonably be expected to take action to end the harassment, and those who could not be so expected. *Young*, 123 F.3d at 675. When an employee informs a supervisor of harassment, it is generally reasonable for that employee to assume that a supervisor is authorized to receive such information and will take appropriate action. This is particularly true where the employer expects employees to follow the chain of command and has not notified them of any different procedure.

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[10] *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972) ("Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.").

Under traditional agency law, "[u]nless the notifier has notice that the agent has an interest adverse to the principal, a notification given an agent is notice to the principal if it is given: (a) to an agent authorized to receive it; [or] (b) to an agent apparently authorized to receive it . . . ." RESTATEMENT OF AGENCY 2D [hereafter, RESTATEMENT] § 268(1)(a), -(b). Because of Gordon's supervisory authority, petitioner and the other lifeguards could reasonably believe that he was authorized to receive complaints of harassment. The fact that they may have also viewed him as a friend or held him in high repute would not be incompatible with such a perception. A rule that knowledge obtained by an agent on the basis of friendship or high repute could not be imputed to the principal is irrational. Friendship or high repute with the notifier would not in itself relieve the agent from, or interfere with the agent's performance of, the duty to act or give the principal information. If anything, it is fair to assume that a supervisor with a high reputation for integrity is more, not less, likely to report this conduct up the chain of command. Hence, there is no reasonable basis not to impute such knowledge to the principal.

Moreover, Personnel Director Bender's testimony makes clear that this case is no different from the general run of cases: it was within the scope of Gordon's employment to observe problems and receive information of significance to the employer, and either resolve the problems himself or report the problems to someone who could resolve them. That is the reason employers use supervisors. Under traditional agency law, Gordon's negligent failure to discharge a duty within the scope of his employment renders the employer liable. RESTATEMENT § 219(1). The discouraging advice Gordon gave to the female lifeguards who complained to him was also given within the scope of his employment as a supervisor, for one of the



principal roles of supervisors is to explain to employees the employer's imperatives and procedures.

That Gordon did not actually report the information to the company should not negate the City's liability. Under agency principles, "the liability of a principal is affected by the knowledge of an agent concerning a matter . . . upon which it is his duty to give the principal information." RESTATEMENT § 272 and comment a. In the employment context, a master's liability is affected "because of the knowledge of, or notification to, a servant, subservant, or subagent which the servant or subagent had a duty to act upon or to communicate to the agent or to the principal because of his employment or apparent employment."[11] *Id.*, § 283(a) and comment *a*, illustration 2.

A rule that imputes only knowledge of "higher", rather than "low-level," management to an employer, fails to reflect the realities of agency and corporate organization. It is common sense that employers generally expect that employees, in reporting workplace concerns, speak with their supervisors, rather than "higher management" of a corporation. Employees also usually assume that they are to seek guidance or help from their supervisors. From concerns about workplace supplies to problems with customers or co-workers, these matters are brought to the attention of supervisors with the reasonable

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[11] *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 876–77 (9th Cir. 1989), *cert. denied*, 498 U.S. 814 (1990), for example, held that the defendant was bound by the knowledge of plaintiff's immediate supervisor that plaintiff's frequent absences from work were due to his cluster migraine condition although the supervisor failed in his duty to report the plaintiff's condition, thus rendering the defendant liable for any failure to make a reasonable accommodation under Washington's disability discrimination law.

expectation that the supervisor has the authority either to rectify the situation or to bring it to the attention of appropriate others. These expectations comport with one of the very reasons for the existence of multiple levels of supervisors: the need to shield "higher" management from being flooded with employee concerns and complaints, and the ability of lower-level supervisors to filter up those that are most important. Because employees in large companies rarely seek out, indeed rarely have any knowledge of or familiarity with, higher management, a notice requirement that employees report complaints of sexual harassment to higher management will effectively allow employers, by imposing many levels of supervisory employees, "to buy immunity from the duties Title VII places on employers." *Young v. Bayer Corp.*, 123 F.3d at 675.

Title VII requires no less. The employer can guard against a supervisor who fails to report harassment through improved personnel selection, training, evaluation, and discipline. None of these tools was used here. The employee has no such tools, particularly where the employer has given her no information that the "chain of command" that is supposed to be used for all things is not really supposed to be used for harassment complaints.

## III. The Lower Court's Requirement that Employees Use an Unadvertised Complaint Procedure To Provide Notice to the City Conflicts with Title VII

By imposing restrictions on both imputed and constructive knowledge, the lower court effectively requires racial and sexual harassment victims to file an internal complaint to place the employer on notice. If there is an internal procedure, the employee must presumably comply with it; here, petitioner's



effort to work within the "chain of command" as required by the employee handbook was held inadequate. An employee like the petitioner is required by the lower court's opinion to come up with her own procedure[12] and hope it will survive the defendant's attack, as it failed to do here. In enacting the Civil Rights Act of 1991, Pub. L. 102–166, 105 STAT. 1071, Congress rejected the imposition of a much lesser burden on sexual harassment victims. Under the standards of *Bob Jones University v. United States*, 461 U.S. 574, 599–602 (1983), this Court may consider that action as relevant to its own construction of Title VII.

President Bush's proposed alternative to the 1991 Act. Introduced in the House by Rep. Michel, § 8(a) of the substitute would have amended § 703(a) of Title VII, defining unlawful conduct by employers, by adding a new subsection (3):

> (3) to harass any employee or applicant for employment because of that individual's race, color, religion, sex, or national origin: *Provided, however*, That no such unlawful employment practice shall be found to have occurred if the complaining party failed to avail himself or herself of a procedure, of which the complaining party was or should have been aware, established by the employer for resolving complaints of harassment in an effective fashion within a period not

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[12] *E.g.*, *Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 262 (4th Cir. 1996), held that the defendant was not liable for a sexually hostile working environment created by her supervisor where the plaintiff knew that her supervisor reported to a corporate officer to whom she could complain, and where she did not complain. The opinion does not discuss any internal complaint system.

exceeding ninety days.

137 CONG REC. H3897 (daily ed., June 4, 1991). Rep. Michel identified the bill as the President's bill. *Id.* at H3898. The Section-by-Section analysis supporting the proposal when introduced stated that it was intended "to encourage employers to adopt meaningful complaint procedures to redress harassment and to encourage employees to use them." 137 CONG REC. H1666 (daily ed., March 12, 1991). Supporters of the 1991 Act sharply criticized this part of the proposal, *inter alia*, as imposing undue burdens and risks on the victims of sexual harassment. *E.g.*, remarks of Rep. Kennelly, 137 CONG REC. H3850 (daily ed., June 4, 1991); remarks of Rep. Edwards, *id.* at H3899; colloquy of Reps. Edwards and Hyde, *id.*; remarks of Rep. Clay, *id.* at H3900; remarks of Rep. Mink, *id.* at H3904. The House rejected the President's substitute bill by a vote of 266 to 162. *Id.* at H3908. The lower court has impermissibly imposed on harassment victims a requirement Congress has resoundingly declared should not be placed on them.

## IV. Section Chief Terry's and Lieutenant or Captain Silverman's Knowledge of Their Own Conduct Can Be Imputed to the City

Terry and Silverman were under the same obligation as Gordon to report their own knowledge of their own harassment to higher levels of City management. The "assistance of cover-up" exception to the duty to report in RESTATEMENT § 280 does not apply where the agent is acting adversely to the principal and his failure to reveal his information "results in a violation of a contractual or relational duty of the principal to a person harmed thereby." RESTATEMENT § 282(2)(a). In the employment relationship, masters are responsible for the



knowledge of their servants without any exception for servants covering up their misdeeds. RESTATEMENT § 283(a).

There can be no reasonable contention here that Terry and Silverman were under no duty to report because their conduct could reasonably be seen as innocent or as not offensive. The record herein is replete with both statements and actions that cross the bounds of acceptable workplace conduct. Even if the supervisor is the person engaging in such actions, both agency law and Title VII require that the supervisor's knowledge of such unacceptable behavior be imputed to the City. Any other rule would substantially undermine Title VII's guarantee of a harassment-free workplace. For example, it would immunize an employer even when a supervisor makes repeated threats of adverse actions if an employee will not submit to his demands for sexual favors, if the employee fails to submit an internal complaint for any reason, and if the supervisor ultimately rapes the employee.[13] Such an approach rewards employers that fail to select, train, evaluate, and discipline supervisors so that they will refrain from, and stop others from engaging in, intolerable conduct. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975), held that the courts' discretion as to remedy "must therefore be measured against the purposes which inform Title VII," and *amici* respectfully suggest that following the same approach will best serve the purposes of Congress in prohibiting sexual harassment.

*Amici*'s suggestion of an objective test builds upon the experience of the courts under *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), for purposes of determining whether a public official is entitled to qualified immunity under 42 U.S.C. § 1983.

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[13] *Gary v. Long*, 59 F.3d at 1397–98.

It is consistent with both agency law and Title VII's purposes.

## V. The City is Liable Because Terry's and Silverman's Actions Were Aided by the Agency Relationship

A master is generally liable for a servant's tort where the servant was aided by the agency relationship in accomplishing the tort. RESTATEMENT § 219(2)(d), second clause. The Third and D.C. Circuits have treated the two clauses of subsec. (d) as conjunctive rather than alternative—despite the word "or" between them—so that an employer policy against sexual harassment bars any finding of "apparent authority" and therefore shields the employer from liability.[14] The Second and Tenth Circuits correctly read "or" as disjunctive.[15]

The facts here show that Silverman could only have accomplished much of his harassment because his supervisory position enabled him to impose his presence on female lifeguards for long periods of time; they could not throw him out or tell him to get lost, as they could with a co-worker. Terry could only have made his harassing comments during hiring interviews by being in charge of the process.

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[14] *Bouton v. BMW of North America*, 29 F.3d 103, 109 (3d Cir. 1994); *Gary v. Long*, 59 F.3d at 1397–98. *Gary* held that the defendant was not liable where its supervisor used his authority to order the plaintiff to help him conduct an inspection of a secluded storage facility, assaulted her en route, and raped her. It is difficult to imagine a more direct use of the agency relationship to accomplish a wrong.

[15] *Karibian v. Columbia University*, 14 F.3d 773, 780 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1445–46 (10th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3137 (U.S., Aug. 6, 1997), No. 97-232.



Moreover, a reasonable factfinder could draw the inference that sustained and extremely frequent levels of unwelcome sexual remarks could only occur and continue over a long time because the key participants were supervisors. It is unrealistic to think that mere co-workers can, all on their own, set such a tone and sustain it for long periods. The purposes of Title VII require a standard rendering an employer liable when a supervisor has directly or indirectly used his authority to engage in or condone harassment.

## VI. Constructive Notice Should Not Be Defeated Simply Because A Work Site is "Remote"

The lower court held that the geographic remoteness of a hostile working environment from the center of the employer's operations makes it impossible to impute constructive knowledge to the City, and repeated this in different form by stating that the knowledge of local officials cannot be imputed to the City precisely because they are not high enough in the hierarchy to be at City Hall. Pet App. 15a–16a.

Title VII simply cannot be read as tolerating two different standards of conduct, depending on whether it occurred at headquarters or in the field, but this will be the inevitable result of barring constructive notice at all but an employer's central site.

## CONCLUSION

*Amici* respectfully urge that this Court clarify the applicable principles of law and reverse the judgment below.

Respectfully submitted,

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